ORIGINAL

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On its Own Motion	)	
v.	)	No. 05-0407
Quality Saw & Seal, Inc.	)	
Determination of Liability Under the Illinois Underground Utility Facilities Damage Prevention Act	)	

BRIEF ON EXCEPTIONS OF QUALITY SAW & SEAL, INC.

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Dated: October 28, 2005

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NOW COMES the respondent, **QUALITY SAW & SEAL, INC.**, (Quality) by and through its attorney, **LAW OFFICE OF JOSEPH P. BUELL**, pursuant to Section 200.830 of the Illinois Commerce Commission's Rules of Practice (83 Ill. Adm. Code 200.830) and hereby submits its Brief on Exceptions to the Administrative Law Judge's Proposed Order issued October 17, 2005.

I. INTRODUCTION

Respondent, Quality, takes exception to the following findings and conclusions contained in the Proposed Order: (1) That concrete pavement is encompassed within the meaning of "earth, rock or other materials" , as that phrase is used in Sections 2.3 and 2.4 of the Act; (2) That saw-cutting of pavement is included within the definition of excavation, as that term is defined in Section 2.3 of the Act; (3) That Quality was required pursuant to Section 4(d) to provide notice under the Act; (4) That not only was the violation willful, but that Quality's own actions show why saw-cutting must

be considered excavation under the Act. Respondent, Quality, maintains that the Administrative Law Judge erred in upholding the penalty imposed upon Respondent, Quality, in the sum of $450.00 for a willful violation of Section 4(d) of the Act.

II. UNDERGROUND DAMAGE PREVENTION ADVISORY COMMITTEE

The Respondent takes exception to various facts in the Proposed Order as follows: "Pursuant to 83 Ill. Adm. Code 265.230, notice was provided to Quality that on September 11, 2004, case number 0025-03 was scheduled to be heard by the Advisory Committee. On September 11, 2004, the Staff presented its case to the Advisory Committee". Respondent, Quality, recommends corrections to the Proposed Order regarding various facts. Pursuant to 83 Ill. Adm. Code 265.230, notice was provided to Quality on December 16, 2004, that case number 0106-04 was scheduled to be heard by the Advisory Committee. On January 13, 2005, Staff presented its case to the Advisory Committee. The Proposed Order must be corrected to reflect history of these proceedings.

III. ALLEGED VIOLATION OF THE ACT

Respondent, Quality, takes exception to the testimony of Staff witness Ted Andersen in the Proposed Order. North Shore Gas, a subsidiary of Peoples Energy Corporation, operates a ¾ inch steel gas service operating at a pressure of 45 p.s.i. and not a ¾ inch gas main as stated in the Proposed Order. The facility was buried at a depth of 8 inches, not 8 to 9 inches as stated in the Proposed Order. Respondent, Quality, recommends corrections to the Proposed Order regarding foregoing facts. (ICC Staff Exhibit 2.0: Direct Testimony of Ted Andersen, p.8 and ICC Staff Exhibit

2.3). The Proposed Order must be corrected to reflect the testimony presented at the August 24, 2005 hearing.

IV. ISSUES PRESENTED

A. IS CONCRETE PAVEMENT "EARTH, ROCK OR OTHER MATERIAL" WITHIN THE MEANING OF THE ACT

Exception 1.

Respondent, Quality, takes exception to the Administrative Law Judge's finding that concrete pavement is encompassed within the meaning of "earth, rock or other materials" as that phrase is used in Section 2.3 and 2.4 of the Act. (Proposed Order, p. 6) Applying the doctrine of *ejusdem generis* in this instance would mandate the Commission find that "concrete or pavement " is not included within the meaning of earth, rock, or other material as that phrase is referenced in Section 2.3 which does not defeat the purpose of the Act. Courts will apply to the words appearing in legislative enactments their common dictionary meaning or commonly accepted use unless the words are otherwise defined by the General Assembly. (Bowes v. City of Chicago, 3 Ill. 2d 175, 120 N.E. 2d 15 (1954); Ceen v. Checker Taxi Co., Inc., 42 Ill. App. 3d 93, 355 N.E. 2d 628 (1st Dist. 1976). Section 2.3 neither includes nor defines the words pavement or concrete. Nor are the words "earth, rock or other material" defined in any other section of the Act. The Administrative Law Judge in his Proposed Order erroneously reads the words "concrete or pavement" into the statutory language without any statutory foundation for this inclusion. This is not permissible. Had the legislature intended to include pavement or concrete in the terms identified in Section 2.3, those terms would have been specifically identified in the definition of "excavation" as were the terms grading, trenching, digging,

ditching, drilling, augering, boring, tunneling, scraping, cable or pipe plowing and driving. There is no legislative history or committee comments to Section 2.3 of the Act which would be persuasive authority for determining whether concrete or pavement was intended to be included within the meaning of earth, rock or other materials. Section 2.3 must be strictly construed as drafted by the legislature. The Commission cannot read into the Act the words concrete or pavement when there was no legislative intent to include those words in Section 2.3 of the Act.

Exception 2.

Respondent, Quality, takes exception to the Administrative Law Judge's finding that the foreign State statutes cited are not similar enough in language to convince the Commission that their definitions are controlling in this matter so as to mandate the Commission to find that saw-cutting pavement is neither excavation nor demolition. (Proposed Order, p. 7) The Georgia Utility Facility Protection Act defines "excavating" as any operation by which the level or grade of the land is changed and includes, without limitation, grading, trenching, digging, ditching, ditching, augering, scraping, and pile driving. Georgia Stat. Ann. 25-9-3. (Quality's Initial Brief, p.18). Excavation is defined in Section 2.3 of the Illinois Underground Utility Facilities Damage Prevention Act as "any operation in which earth, rock, or other material in or on the ground is moved, removed, or otherwise displaced by means of any tools, power equipment or explosives and includes without limitation grading, trenching, digging, ditching, drilling, augering, boring, tunneling, scraping, cable or pipe plowing and driving. The activities identified in both the Georgia Utility Facility

Protection Act and Illinois Underground Utility Facilities Damage Prevention Act are similar in nature with saw-cutting not being included in either statute's language.

Exception 3.

The Respondent, Quality, takes exception to the Administrative Law Judge relying upon an amendment to the Act, 220 ILCS 50/2.3 effective August 18, 2005 to buttress its interpretation that concrete pavement is encompassed within the meaning of "earth, rock, or other material" as that phrase is used in Sections 2.3 and 2.4 of the Act unless it is excluded by exemption. (Proposed Order, pp. 5-6). The Administrative Law Judge further concludes that "were concrete or roadways not intended to be covered under the Act, there would be no need to add an exemption for the top surface milling of a road, it would be exempt all ready". (Proposed Order, p.6). It is improper that the Staff, for the first time in its Reply Brief, notes the recent amendment of the Act wherein the legislature exempted roadway surface milling from the definition of "excavation". The Amendments to the Act passed both Houses on May 29, 2005. The Amendment was sent to the Governor on June 27, 2005. On June 29, 2005 the Commission initiated this proceeding against Quality pursuant to Article X of the Public Utilities Act ("PUA"), 220 ILCS 5/10-101 et seq., and Section 11(m) of the Illinois Underground Utility Facilities Damage prevention Act ("Act"), 220 ILCS 50/1 et seq. The Staff did not refer to the Amendment to Section 2.3 of the Act at the evidentiary hearing on August 24, 2005 even though the Amendment was effective August 18, 2005. The Staff did not reference the Amendment to Section 2.3 in its Initial Brief filed on September 21, 2005. Rather, Staff raised the Amendment for the first time on October 3, 2005 in its Reply Brief to

respondent, Quality's Initial Brief. This is improper. The purpose of a Reply Brief is to respond only to the contentions raised in an Initial Brief, not to raise new arguments. Where respondent, Quality, had no opportunity to present rebuttal argument on this untimely and improper claim, the Administrative Law Judge erred in relying on the Amendment to Section 2.3 of the Act in reaching his conclusion that concrete pavement is encompassed within the meaning of "earth, rock or other materials" as that phrase is used in Section 2.3 and 2.4 of the Act to defeat the application of the doctrine of *ejusdem generis*. The Commission should now refuse to adopt the Administrative Law Judge's findings and conclusions in this regard since the Amendment was not raised in the evidentiary hearing of the Initial Brief of Staff.

Moreover, there is no showing that the activity referred to in the Amendment, roadway surface milling, has any relevance to the issue of whether saw-cutting constitutes "excavation." Roadway surface milling is used to remove asphalt. Saw-cutting is performed on concrete. Roadway surface milling is a two dimensional operation to remove asphalt in paths approximately six feet wide whereas saw-cutting is one dimensional in operation. Respondent, Quality, had no opportunity to present expert testimony on any of these matters at the evidentiary hearing.

In his Proposed Order, the Administrative Law Judge presumes that all activities are included within the definition of "excavation" unless the activity is specifically not included in the Act. This argument is contrary to the history of the Act with respect to the amendment of Section 2.3. Section 2.3 of the Act, 220 ILCS 50/2.3, was amended effective July 1, 2002 to include the word "**boring**" within the enumerated activities covered by the Act as "excavation". Clearly there would be no

need to include the word "boring" within excavation if the legislature assumed that all activities are included within "excavation" unless specifically not included. The legislative history of the Act does not support the Administrative Law Judge's conclusion that concrete pavement is encompassed within the meaning of "earth, rock or other materials", as that phrase is used in Sections 2.3 and 2.4 of the Act.

Applying the doctrine of *ejusdem generis* does not subvert the meaning and intent of the Illinois Underground Utilities Facilities Damage Prevention Act. While the purpose of the Act is threefold: to prevent negligent or unsafe excavation or demolition operations, to protect persons and property, and to preserve utility services, the Act is not to be applied in a way which would create an unintended and absurd result. The activity involved in this proceeding is saw-cutting. It is an activity that is done under the guidance and observation of resident engineers and technicians on public roadway projects in the State of Illinois governed by the Standard Specifications of Road and Bridge Construction adopted by the Illinois Department of Transportation.

Exception 4.

Respondent takes exception to the Proposed Order's representation that "to hold as Respondent suggests would give free rein to the parties throughout the state to cut into pavement and concrete, without regard for the existence of utilities in the area as long as they do not intend to proceed into the earth or rock, or other naturally occurring materials below the pavement or concrete". Staff's witness, Ted Andersen, defined 'excavation' as "When a saw-cutter's blade goes beyond the thickness of the pavement and penetrates the soil below, it becomes an excavation

and thus requires a call to JULIE". (ICC Staff Exhibit 2.0: Direct Testimony of Ted Andersen, p. 4). Staff witness, William Riley, Manager of JULIE Enforcement for the Illinois Commerce Commission admitted that he was not familiar with the Standard Specifications for Road and Bridge Construction adopted January 1, 2002 by the Illinois Department of Transportation. (Report of Proceedings, pp. 28-29). Mr. Riley has never gone to a work site to observe saw-cutting and does not know what type of equipment is used in saw-cutting. (Report of Proceedings, p. 30). Quality witness, Thomas Hahn, testified that the location of the gas service violated 49 CFR 192.361, as adopted by 220 ILCS 20/3, which requires each buried service line to be installed with at least 18 inches of cover in streets and roads. (Quality Exhibit 3.0: Direct Testimony of Thomas Hahn, pp. 2,5,11: Quality Exhibit 3.6, Quality Exhibit 3.7) Staff witness, William Reilly, also points out "that it is likely that this damage would have occurred whether or not Quality complied with the the provisions of Section 4(d) as the gas line was just below the pavement surface. Thus, there was little that Quality could have done to avoid this damage. Consequently, had Quality requested its own locate request prior to this incident, staff would likely not be assessing a penalty here". (ICC Staff Exhibit 1.2). It appears from Mr. Reilly's statement in ICC Staff Exhibit 1.2 that it was the failure of Quality to call for a locate even though a locate was requested by Chicagoland Paving which initiated this action and not the damage to the facility. This statement by Mr. Reilly acknowledges that a location mark does not prevent damage to a gas facility which is located in pavement in violation of the Commission's own rules regarding buried depth of facilities. If the Commission adopts the Administrative Law Judge's proposed

finding to err on the side of safety of the underground utility facilities and the protection of the People of the State of Illinois in finding concrete pavement encompassed within the meaning of "excavation" within the meaning of earth, rock or other materials, as that phrase is used in Section 2.3 and Section 2.4, the Commission would ignore its other regulations for the protection of persons, property and utility services. Saw-cutting of pavement presents no general danger to underground utility facilities because 49 CFR 192.361, as adopted by the Illinois Commerce Commission, 220 ILCS 20/3, requires each buried service line to be installed with at least 18 inches of cover in streets and roads. It is clear that underground gas facilities are not to be buried in concrete pavement as was the ¾ inch gas service found in this case. The adoption of the doctrine of *ejusdem generis* in the manner suggested by the respondent, Quality, does not subvert the meaning and intent of the Illinois Underground Utility Facilities Damage Prevention Act, 220 ILCS 50/2.3 and 2.4.

B. DOES SAW-CUTTING OF CONCRETE COME WITHIN THE DEFINITION OF "EXCAVATION" OR "DEMOLITION" IN THE ACT

The definition of "excavation" within 220 ILCS 50/2.3 reads as follows:

50/2.3 Excavation

> "Excavation" means any operation in which earth, rock, or other material in or on the ground is moved, removed, or otherwise displaced by means of any tools, power equipment or explosives, and includes, without limitation, grading, trenching, digging, ditching, drilling, augering, boring, tunneling, scraping, cable or pipe plowing, and driving but does not include farm tillage".... (emphasis added).

The Act amended effective July 1, 2002 added the word **boring** in the statute. If boring already was included within the definition of "excavation" when the Act became effective January 1, 1991 there was no need by the legislature to include that term within the definition of "excavation" in Section 2.3 when the Act was amended . By adding boring to the definition of "excavation" the legislature included an activity within the definition of "excavation" which activity was not included within said definition prior to the amendment of Section 2.3 effective July 1, 2002.

Exception 5.

Respondent takes exception to the Administrative Law Judge's finding that a reasonable interpretation of the Act, taking into account the legislative purpose of the Act, requires a conclusion that saw-cutting of pavement is included within the definition of excavation as that term is defined is Section 2.3 of the Act. (Proposed Order, p.7). Further, Respondent takes exception to the Commission's finding that the declarations of the Illinois Department of Transportation Standard Specifications have no place in aiding the Commission in determining what activities are covered under the Act. (Proposed Order p. 7).

"Excavation" as defined in Section 2.3 does not define depth. The Act is silent on burial depth, and does not specify any depth for which an activity becomes excavation. (ICC Staff Ex. 1.2: Report of Proceedings, p. 34). Section 2.3 does not distinguish "new" verses "old" concrete . Quality was saw cutting concrete pavement on August 10, 2004 near Kipling Lane, Highland Park, Illinois. (Quality Exhibit 3.0: Direct Testimony of Thomas Hahn, p.5) The ¾ gas service was installed in 1977.

(Quality Exhibit 3.0: Direct Testimony of Thomas Hahn, p. 11). Since the pavement was installed in 1977, it was obviously old.

New concrete pavement is designed with saw cuts in order to locate contraction joints in the roadway. This sawing procedure does not involve the removal of the pavement. (Quality Exhibit 4.0: Direct Testimony of James Prola, p.11). Road improvement activities that involve saw cutting in addition to full depth saw cutting activities include traffic control signal activation and sawing control joints when pouring new concrete P.C.C. pavement. (Quality Exhibit 1.0; Direct Testimony of Scott Eilken p.9)

Section 4(d) of the Act, provides, that every person who engages in non-emergency excavation or demolition shall: Provide notice not less than 48 hours (exclusive of Saturdays, Sundays and holidays) but no more than 14 calendar days in advance of the start of the excavation or demolition to the owners or operators of the underground utility facilities or CATS facilities in and near the excavation or demolition area through the State-Wide One-Call Notice System, ...

Exception 6.

The Respondent takes exception to the Administrative Law Judge's placing no value on the Illinois Department of Transportation standards in aiding the Commission in determining what activities are covered by the Act.

Article 420.10 of the Standard Specifications for Road and Bridge Construction adopted January 1, 2002 by the Illinois Department of Transportation provides:

> **Joints.** Joints shall be constructed of the type and dimensions, and at the locations required by the contract. (a) Longitudinal Sawed Joint. Longitudinal sawed joints shall be formed by cutting the surface of the pavement by means of approved concrete saws to the depth, width and line shown on the plans. Suitable

guidelines or devices shall be used to assure cutting of the longitudinal joint on the true line as shown on the plans. Sawing of the longitudinal joint shall commence as soon as the concrete has hardened sufficiently to permit sawing without excessive raveling, usually **four to 24 hours**. All joints shall be sawed to the full depth as shown on the plans before uncontrolled shrinkage cracking takes place. If necessary, the sawing operations shall be carried on both during the day and night regardless of weather conditions. (d) Transverse Contraction Joints. Transverse contraction joints shall consist of planes of weakness created by cutting grooves in the surface of the pavement and shall include load transfer devices. Sawed contraction joints shall be created by sawing grooves in the surface of the pavement, of the dimensions and at the spacing and lines shown on the plans, with an approved concrete saw. After each joint is sawed, the saw cut and adjacent concrete surface shall be thoroughly cleaned. Sawing of the joint shall commence as soon as the concrete has hardened sufficiently to permit sawing without excessive raveling, usually **four to 24 hours**. All joints shall be sawed to the full depth before uncontrolled shrinkage cracking takes place. If necessary, the sawing operations shall be carried on both during the day and night, regardless of weather conditions. (emphasis added).

The Administrative Law Judge's Proposed Order finding that saw-cutting of pavement is included within the definition of excavation as that term is defined is Section 2.3 would render it impossible for those engaged in saw-cutting who are mandated by contract to comply with the Standard Specification for Road and Bridge Construction adopted by IDOT for all municipal road improvement contracts to comply with the foregoing contract specification. A contractor engaged in sawing control joints when pouring new concrete would be required to contact the State-Wide One-Call Notice System to comply with Section 4(d) of the Act. The saw-cutting contractor would have to wait 48 hours after providing notice before it could begin saw cutting full depth control joints for contraction joints for new concrete. In order to comply with this Proposed Order the saw-cutting contractor would breach its contract with IDOT or the municipal entity by failing to comply with Article 420.10 of the Standard Specifications for Road and Bridge Construction thus subjecting the contractor to a breach of contract action for damages sustained to the new concrete

pavement which was not saw cut within the time specified by the Standard Specification for Road and Bridge Construction adopted by the Illinois Department of Transportation. This absurd result demonstrates why the Commission should not accept the Administrative Law Judge's conclusion that saw-cutting is "excavation".

Exception 7.

The Respondent takes exception to the Administrative Law Judge's finding that the Illinois Department of Transportation (IDOT) standards are not controlling when deciding whether saw-cutting constitutes "excavation" for purposes of the Act. (Proposed Order, p. 7) The legislature has designated the Illinois Department of Transportation (IDOT) as the agency having the power to adopt rules, regulations and specifications for State highways. Section 4-201.1, of the Illinois Highway Code, 605 ILCS 5/4-201.1, grants the Illinois Department of Transportation the power "to determine and adopt rules, regulations and specifications for State highways." James Prola testified that the Standard Specifications for Road and Bridge Construction adopted January 1, 2002 by the Illinois Department of Transportation outlines the general requirements and covenants applicable to all highway construction improvements as well as provisions relating to materials, equipment and construction requirements for individual items of work on road and bridge projects awarded by IDOT. (Quality Exhibit 4.0: Direct Testimony of James Prola, p. 4). IDOT manuals, including the Standard Specifications for Road and Bridge Construction adopted January 1, 2002, have the force of law. See *Millburn v. Glaze,* 86 Ill. App. 3d 1055, 43 Ill. Dec. 295 (2nd Dist. 1980).

Exception 8.

The Respondent, Quality, takes exception to the Administrative Law Judge's opinion of the issue addressed in Northern Illinois Gas Company v. R.W. Dunteman Company. (Proposed Order, p.7). In Dunteman, the contractor requested of the Du Page County Division of Transportation that the vertical locations be marked on a Du Page County project. Since the owner of the project did not request that the facilities be located vertically, the departmental policies of IDOT were irrelevant to the disposition of the case.

If adopted, the Administrative Law Judge's Proposed Order will create confusion and hardship because it will interfere with IDOT's ability to require compliance with contract specifications pertaining to saw-cutting of new concrete pavement on road construction projects in the State of Illinois. This is particularly unacceptable because IDOT is the agency that has been granted the power to exercise complete control over road construction projects by the legislature. The Commission's power and authority to enforce the provisions of the Section 11 of the Act do not grant it the authority to ignore or disregard IDOT's power to adopt rules, regulations and specifications for highways in the State of Illinois. Clearly, Section 11(j) of the Act does not grant the Commission the authority to read into the Act an activity which another agency, IDOT, by reason of authority received from the legislature, has excluded by declaration or intendment from excavation. The consequence of this Proposed Order will force a saw-cutting contactor when engaged in full depth saw-cutting new concrete pavement for contraction joints to either violate Section 4(d) of the Act or breach its contract with IDOT or a municipal entity

in order to comply with the Standard Specification for Road and Bridge requiring this activity be completed within 4 to 24 hours as specified by the IDOT Standards. What is significant about this standard is that the sawing shall be carried on both during the day and night regardless of weather conditions. Clearly, the Proposed Order will have a detrimental affect on how IDOT will conduct road improvement projects in the State of Illinois.

Exception 9.

Since the Proposed Order did not provide a finding of whether saw-cutting of pavement also constitutes demolition, as that term is defined is Section 2.4 of the Act, the Respondent will not respond to this issue as it has not been raised of record.

C. WAS THE ALEGED VIOLATION BY QUALITY WILLFUL

Exception 10.

Respondent, Quality, takes exception to the Administrative Law Judge's finding that the case law and administrative rules are clear that a utility is required only to horizontally locate its facilities, and is not required to provide a vertical locate. Rules and regulations, pertaining to utility accommodations, by permit, on existing IDOT right-of-way, are primarily found in Title 92, Part 530 of the Illinois Administrative Code, titled "Accommodation of Utilities on Right-of Way" ("Part 530"), effective since at least 1992. Part 530.40(c) requires the permittee to ascertain the presence and location of existing above-ground or underground facilities on the highway right-of-way to be occupied by the proposed facilities. In addition, Part 530.40(c) requires that "a permittee shall locate, physically mark, and **indicate the depth** of its underground facilities within 48 hours, excluding weekends and holidays". (Emphasis added). Respondent, Quality,

contends that a utility facility owner or operator, when working on their facilities pursuant to an IDOT permit, are bound by the regulations of Part 530, which in certain instances, will take precedence over the Commission's Proposed Rules, and impose additional requirements beyond those of the Illinois Underground Utility Facilities Damage prevention Act and of the Proposed Rules. This primacy of IDOT Rules and permit requirements is agreed to by utility owners and operators, in return for their use, gratis, of IDOT right-of-way. The relevant administrative rules do provide that a utility is required to vertically locate facilities.

As stated earlier in this Brief on Exceptions, Mr. Riley pointed out that it is likely that this damage would have occurred whether Quality complied with the provisions of Section 4(d) or not. It was North Shore Gas Company's failure to comply with the Commission's own regulations regarding buried depth which shows why gas services must be buried with 18 inches of cover and not the act of saw-cutting across an area indicated by location marks which resulted in this incident.

Exception 11.

Respondent, Quality, takes exception to the Administrative Law Judge's finding that there was a willful violation for the additional reason that whether saw-cutting constitutes "excavation" or " demolition" under the Act presents a matter of first impression in this case. The position of respondent, Quality, which is consistent with IDOT contract specifications and buttressed by the opinion of a licensed, professional engineer among other expert witnesses, is that saw-cutting is not "excavation" or "demolition." There is no question that respondent, Quality, has raised this issue in good faith and its conduct in doing so should not be penalized as "willful". In *Buckner v.*

Causey, 311 I.. App. 3d 139, 724 N.E. 2d 95 (1st Dist. 1999), the First District ruled that a litigant's appeal of a trial court's decision was not frivolous, and hence not subject to sanctions under Supreme Court Rule 375, where the issue raised on appeal was one of first impression. The Second District in *Roser v. Anderson*, 222 Ill. App. 3d 1071, 584 N.E. 2d 865 (2nd Dist. 1991), ruled that an automobile insurer's position was not frivolous and not subject to sanction under Rule 375 where the issue before the court was one of first impression. In the case at bar, by the same token, there is no existing precedent and respondent, Quality's action in challenging Staff's determination was not willful. The Administrative Law Judge erred in upholding the penalty imposed upon Respondent, Quality, in the sum of $450.00 since there was no willfull violation of Section 4(d) of the Act.

V. **CONCLUSION**

For the above reasons, Respondent, Quality, respectfully requests that the Proposed Order be modified as requested herein, and as provided in Quality's exceptions and (Brief on Exceptions Attachment "A"), and that the Commission enter an Order in conformance with and for the reasons and rationale expressed in this Brief on Exceptions and Brief on Exceptions Attachment "A" as the Final Order in this proceeding.

Respectfully submitted,

By: Joseph P. Buell
Joseph P. Buell

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Dated: October 28, 2005

BRIEF ON EXCEPTIONS ATTACHMENT "A"

I. DEFINITIONS

The definition of "excavation" within 220 ILCS 50/2.3, effective July1, 2002, reads as follows:

50/2.3 Excavation

"Excavation" means any operation in which earth, rock or other material in or on the ground is moved, removed, or otherwise displaced by means of any tools, power equipment or explosives, and includes, without limitation, grading, trenching, digging, ditching, drilling, augering, boring, tunneling, scraping, cable or pipe plowing, and driving but does not include farm tillage..... (Emphasis added).

The definition of "demolition" within 220 ILCS 50/2.4, effective July 1, 2002, reads as follows:

50/2.4 Demolition

"Demolition" means the wrecking, razing, rending, moving, or removing of a structure by means of any power tool, power equipment (exclusive of transportation equipment) or explosives.

50/4 Required Activities

Every person who engages in nonemergency excavation or demolition shall:

(d) provide notice not less than 48 hours (exclusive of Saturdays, Sundays and holidays) but no more than 14 calendar days in advance of the start of the excavation or demolition to the owners or operators of the underground utility facilities or CATS facilities in and near the excavation or demolition area through the State-Wide One-Call Notice System, or in the case of nonemergency excavation or demolition within the boundaries of a municipality of at least one million persons which operates its own one-call notice system, through the one-call notice system which operates in that municipality.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW OF THE ADMINISTRATIVE LAW JUDGE AND RESPONDENT, QUALITY'S PROPOSALS AND ORDERING PARAGRAPHS

II. UNDERGROUND DAMAGE PREVENTION ADVISORY COMMITTEE

Administrative Law Judge's Findings:

Quality requested an appeal of the Staff's decision to the Underground Damage Prevention Advisory Committee. Pursuant to 83 Ill. Adm. Code 265.230, notice was provided to Quality that on September 11, 2004, case number 0025-03 was scheduled to be heard by the Advisory Committee. On September 11, 2004, Staff presented its case to the Advisory Committee.

Respondent, Quality's Proposal:

Quality requested an appeal of Staff's decision to the Underground Damage Prevention Advisory Committee. Pursuant to 83 Ill. Adm. Code 265.230, notice was provided to Quality that on December 16, 2004, case number 0106-04 was scheduled to be heard by the Advisory Committee. On January 13, 2005, Staff presented its case to the Advisory Committee.

III. ALLEGED VIOLATION OF THE ACT

1. Administrative Law Judge's Findings:

Staff witness Mr. Andersen testified that North Shore, a subsidiary of Peoples Energy Corporation, operates a ¾ inch, 45 p.s.i. steel gas main in the area where Quality was excavating, which was buried at a depth of 8-9 inches.

Respondent, Quality's Proposal:

Staff witness Mr. Andersen testified that North Shore, a subsidiary of Peoples Energy Corporation, operates a ¾ inch, 45 p.s.i. steel gas service in the area where Quality was excavating, which was buried at a depth of 8 inches.

V. ISSUES PRESENTED

A. Does the doctrine of *ejusdem generis* exclude pavement from the definition of earth, rock, or other material" as used in the Act

Administrative Law Judge's Findings:

Respondent contends that the doctrine of *ejusdem generis* requires that the Commission find that "pavement " is not included within the meaning of "earth, rock, or other material", as that phrase is used in Sections 2.3 and 2.4 of the Act. Quality contends that under this doctrine, the only items that can come within the phrase "other material" are naturally-occurring materials that form a part of the earth's surface, and cannot include man-made objects, like concrete, pavement or asphalt. Staff's position is that while the doctrine of *ejusdem generis* could at first glance be used to construe a statute in this matter, this doctrine must yield, if to apply would defeat the evident purpose of the statute.

In the matter before the Commission, we are concerned with the cutting of concrete by a contractor, and whether concrete can be included in the definition of "earth, rock or other material" if this doctrine applies. While the Respondent seeks to rely on the difference between man-made objects and other naturally occurring objects, the Commission is not convinced this is a fair reading of the doctrine.

Assuming *arguendo* that the Commission should apply the doctrine of *ejusdem generis* in the manner suggested by the Respondent, the Commission is of the opinion that this would subvert the clear meaning and intent of the Underground Facilities Damage Prevention Act. To hold as the Respondent suggests would give free rein to parties throughout the State to cut into pavement and concrete, without any regard for the existence of utilities in the area, as long as they do not intend to proceed into the earth or rock, or other naturally occurring materials below the pavement or concrete. This would clearly contravene the intent of the statute, and the Commission finds that if an error is to be made, we will err on the side of the safety of the underground utility facilities and the protection of the People of the State of Illinois.

The interpretation of the Act is buttressed by the amendments of the Act contained in PA 94-0623. As indicated above, this amendment exempted from the Act roadway surface milling, defined as the removal of the top surface of a road, not including the base or subbase. Were concrete or roadways not intended to be covered under the Act, there would be no need to add an exemption for the top surface milling of a road, it would be exempt all ready.

Commission's Conclusion: We therefore find that concrete pavement is encompassed within the meaning of "earth, rock or other materials", as that phrase is used in Sections 2.3 and 2.4 of the Act.

Respondent Quality's Proposal:

Applying the doctrine of *ejusdem generis* in this instance would mandate the Commission to find that "concrete or pavement" is not included within the meaning of earth, rock, or other material as that phrase is referenced on Section 2.3 which does not defeat the purpose of the Illinois Underground Utility Facilities Damage Prevention Act, 220 ILCS 50/2.3. Section 2.3 neither includes nor defines the words pavement or concrete. Nor are the words "earth, rock or other materials" defined in any section of the Act, 220 ILCS 50/2.3. Had the legislature intended to include pavement or concrete within the terms identified in Section 2.3 of the Act, those terms would have been specifically identified in the definition of "excavation" such as grading, trenching, digging, ditching, drilling, augering, boring, tunneling, scraping, cable or pipe plowing and driving. There is no legislative history or committee comments to Section 2.3 of the Act which would be persuasive authority for determining whether concrete or pavement was intended to be included within the meaning of earth, rock or other materials. Section 2.3 of the Act must be strictly construed as drafted by the legislature.

Staff raised the Amendment to Section 2.3 of the Act effective August 18, 2005 for the first time in its Reply to Quality's Initial Brief. This is improper. Where respondent, Quality, had no opportunity to present rebuttal argument on this untimely claim, the Administrative Law Judge erred in relying on the Amendment to Section 2.3 of the Act in reaching his conclusion that concrete pavement is encompassed within the meaning of "earth, rock or other materials" as that phrase is used in Section 2.3 and 2.4 of the Act to defeat the application of the doctrine of *ejusdem generis*. The Commission refuses to adopt the Administrative Law Judge's findings and conclusions relying on the Amendment to Section 2.3 of the Act, 220 ILCS 50/2.3.

The Administrative Law Judge incorrectly presumed that all activities are included within the definition of "excavation" unless the activity is specifically not included in the Act. This presumption is contrary to the history of the Act with respect to the amendment of Section 2.3 effective July 1, 2002, which included the word "**boring**" within the enumerated activities covered by the Act as "excavation". The legislative history of the Act does not support the Administrative Law Judge's conclusion that concrete pavement is encompassed within the meaning of "earth, rock or other materials", as that phrase is used in Section 2.3 and 2.4 of the Act.

Respondent's Quality's Conclusion:

Section 2.3 of the Act neither includes nor defines the words pavement or concrete. Applying the doctrine of *ejusdem generis* does not defeat the purpose or intent of the statute. Concrete pavement is not encompassed within the meaning of "earth, rock or other materials", as that phrase is used in Sections 2.3 and 2.4 of the Act, 220 ILCS 50/2.3 and 50/2.4.

B. Does the saw-cutting of concrete come within the definition of "excavation" or "demolition" in the Act.

Administrative Law Judge's Findings:

None of the other State statutes cited are similar enough in language to convince the Commission that their definitions are controlling in this matter, so as to mandate the Commission to find that saw-cutting pavement is neither excavation nor demolition. The Federal provision cited is not in the context of the protection of underground utility facilities, and is also not applicable. The reliance that Quality places on the Illinois Department of Transportation standards also have no place in aiding the Commission in determining what activities are covered under the Act. We therefore find any declarations by the Illinois Department of Transportation are not controlling of the Act. This does appear to be a case of first impression, as neither party has been able to cite, from this or any other jurisdiction, directly addressing whether saw-cutting is either excavation or demolition, in the context of an act designed to protect underground utility facilities.

Commission's Conclusion:

This Commission is satisfied that a reasonable interpretation of the Act, taking into account the legislative purpose behind the Act, requires us to find that saw-cutting of pavement is included within the definition of excavation, as that term is defined in Section 2.3 of the Act. This being the case, it is not necessary to find whether saw-cutting of pavement also constitutes demolition, as that term is defined in Section 2.4 of the Act.

Respondent, Quality's Proposal:

This Commission is satisfied that saw cutting of pavement is not included within the definition of excavation, as that term is used in Section 2.3 of the Act taking into account the legislative history of the Act, the statutory grant to the Illinois Department of Transportation "to determine and adopt rules, regulations and specifications for State

highways, 605 ILCS 5/4-201.1; the declarations of the Illinois Department Transportation Standard Specifications for Road and Bridge Construction regarding saw-cutting; the provisions of 49 CFR 192.361, as adopted by the Illinois Commerce Commission in 220 ILCS 20/3, requiring each buried service line to be installed with at least 18 inches of cover in streets and roads; and the legislature's intent to not specifically include "saw-cutting" within "excavation" as defined in Section 2.3 of the Act, 220 ILCS 50/2.3.

C. Was notice given under the Act to the State-Wide One-Call Notice System?

Administrative Law Judge's Findings:

The Commission agrees with Mr. Riley's interpretation of the Act, and find that Quality did not request a locate pursuant to Section 4(d). Quality has maintained throughout this proceeding that it does not consider saw-cutting excavation, and therefore it is not required to obtain a locate.

Commission's Conclusion:

We determine that Quality was required to provide notice under the Act, and failed to do so.

Respondent, Quality's Primary Proposal:

Since saw-cutting pavement is not included within the definition of "excavation" in Section 2.3 of the Act, Quality was not required pursuant to Section 4(d) to provide notice under the Act when engaged in nonemergency excavation or demolition.

D. Was the alleged violation by Quality willful?

Administrative Law Judge's Findings:

Despite the gas line being properly located, the operator of the machine cut across the area indicated by the locate marks, and cut the gas line. Evidence at the hearing indicated that the gas line should have been buried at least 18 inches deep, but was in fact only 8-9 inches below the surface of the pavement.

Commission's Conclusion:

All this leaves the Commission with the belief that not only was the violation willful, but that Quality's own actions show why saw-cutting must be considered excavation under the Act.

Respondent, Quality's Proposal:

The position of Respondent, Quality, is consistent with the IDOT Standard Specifications and buttressed by the opinion testimony of a licensed professional engineer that saw-cutting is not "excavation" or "demolition". Since saw-cutting of concrete pavement is not "excavation" within the definition of Section 2.3 of the Act, Quality did not willfully violate Section 4(d) of the Act.

V. ASSESSMENT OF PENALTY

Administrative Law Judge's Findings:

Section 11(a) of the Act provides the Commission with the authority to assess a penalty of up to $5,000 for violations of Section 4 of the Act. Section 11(j) of the Act specifies that when a penalty is warranted, the following criteria shall be used in determining the magnitude of the penalty: (1) gravity of noncompliance; (2) culpability of offender; (3) history of noncompliance; (4) ability to pay penalty; (5) show of good faith of offender; (6) ability to continue business; and (7) other special circumstances. In the Commission's view, based on the facts, circumstances and explanations presented in this proceeding, the penalty developed in Staff's analysis properly considers and balances the seven criteria enumerated in Section 11(j) of the Act and above. The Commission agrees with Staff that Quality is fully culpable for its violation of the Act.

Commission's Conclusions:

Having previously found in this Order that on August 10, 2004 Quality willfully violated Section 4(d) of the Act, the Commission concludes that a penalty of $450.00 should be imposed upon the Respondent.

Respondent, Quality's Proposal:

Since saw-cutting of concrete pavement is not excavation within the definition of Section 2.3 of the Act, the Administrative Law Judge erred in concluding that a penalty pursuant to Section 11(a) of the Act in the sum of $450.00 should be imposed upon Respondent, Quality.

VI. ORDERING PARAGRAPHS

Paragraphs 3, 4 and 5 of the Commission's Findings and Ordering Paragraphs should be deleted in their entirety and replaced with the following:

Paragraph 3 of the Findings and Ordering Paragraphs should be modified as follows:

IT IS FURTHER ORDERED that concrete pavement is not encompassed within the meaning of "earth, rock or other materials", as that phrase is used in Sections 2.3 and 2.4 of the Act, 220 ILCS 50/2.3, 2.4.

IT IS FURTHER ORDERED that saw-cutting concrete pavement does not come within the definition of "excavation" or "demolition" in Section 2.3 and 2.4 of the Act, 220 ILCS 50/2.3, 2.4.

IT IS FURTHER ORDERED that Quality was not required pursuant to Section 4(d) of the Act, 220 ILCS 50/4, to provide notice under the Act since it was not engaged in nonemergency excavation or demolition.

Paragraph 4 of the Findings and Ordering Paragraphs should be modified as follows:

IT IS FURTHER ORDERED that Quality did not willfully violate Section 4(d) of the Act by failing to provide notice through the State-Wide One-Call Notice System prior to commencing excavation activities since it was not engaged in nonemergency excavation or demolition.

Paragraph 5 of the Findings and Ordering Paragraphs should be modified as follows:

IT IS FURTHER ORDERED that the Administrative Law Judge erred in upholding the penalty imposed upon Respondent, Quality, in the sum of $450.00 for a willful violation of Section 4(d) of the Act and this cause is dismissed with prejudice.

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion	)	
	)	No. 05-0407
vs.	)	
Quality Saw & Seal, Inc.,	)	

NOTICE OF FILING AND HAND DELIVERY BY FEDEX

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE, that on the 28th day of October, 2005, there was delivered to FedEx at 2 N. La Salle Street, Chicago, Illinois for overnight delivery on October 31, 2005 to the Chief Clerk of the Illinois Commerce Commission for filing with the Chief Clerk of the Illinois Commerce Commission and overnight delivery on October 31, 2005 to Counsel of Record and Commission Staff, the attached, **BRIEF ON EXCEPTIONS OF QUALITY SAW & SEAL, INC., together with BRIEF ON EXCEPTIONS ATTACHMENT "A"**, on behalf of the Respondent, Quality Saw & Seal, Inc., copies of which are attached hereto and served upon you.

LAW OFFICE OF JOSEPH P. BUELL

Joseph P. Buell

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CERTIFICATE OF ATTORNEY

Joseph P. Buell, an Attorney, hereby certifies that he has served a true and correct copy of the foregoing Notice of Filing and Hand Delivery by FedEx, and the attached, **BRIEF ON EXCEPTIONS OF QUALITY SAW & SEAL, INC., together with BRIEF ON EXCEPTIONS ATTACHMENT "A"**, served upon each person to whom said Notice of Filing and Hand Delivery by Fed Ex, is directed by delivering on October 28, 2005 to FedEx at 2 N. La Salle Street, Chicago, Illinois for overnight delivery on October 31, 2005 to the Chief Clerk of the Illinois Commerce Commission for filing with the Chief Clerk of the Illinois Commerce Commission and by overnight delivery a copy to Counsel of Record and Commission Staff by delivering said copies to FedEx at 2 N. La Salle Street, Chicago, Illinois this 28th day of October, 2005 for delivery to Counsel of Record and Commission Staff on October 31, 2005.

LAW OFFICE OF JOSEPH P. BUELL

Joseph P. Buell

AFFIDAVIT OF ATTORNEY

I, Joseph P. Buell, being duly sworn and under oath, do depose and state that I am a licensed attorney in the State of Illinois and that, were I called upon to give testimony from my own personal knowledge as to the matters set forth in this NOTICE OF FILING AND HAND DELIVERY by FedEx, the statements herein made are accurate, true and correct.

By: Joseph P. Buell

Subscribed and sworn to before me this 28th day of October, 2005.

Nancy J Suver

NOTARY PUBLIC

OFFICIAL SEAL
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ILLINOIS COMMERCE COMMISSION V QUALITY SAW & SEAL, INC.

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